No. 9779.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FANCHON & MARCO, INC., a corporation,

Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

The appellant, Fanchon & Marco, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California.

The appellee, Hagenbeck-Wallace Shows Company, is a corporation organized and existing under and by virtue of the laws of the State of Indiana.

The appeal is from a judgment in favor of the appellee in the sum of fifteen thousand six and 07/100 dollars ($15,006.07), general damages and costs rendered upon a judgment by the Court.

The complaint alleges the making and execution of a written contract dated May 22, 1939, wherein the appellee leased to appellant specified circus equipment for five weeks under certain terms and conditions, and wherein the appellant agreed to pay as rent therefor the sum of two thousand five hundred dollars ($2,500.00) per week. It is further alleged in the complaint, that the appellee delivered said equipment in compliance with the terms of the contract, in good condition, ready for use, and that appellee has performed all the other covenants in said contract to be performed by appellee, and that the appellant has failed and refused to pay the rental of two thousand five hundred dollars ($2,500.00) a week for the period, and that the whole amount together with interest thereon is due and owing from appellant to appellee. [Pr. Tr. pp. 2-14.]

It is further alleged, that on or about May 31, 1939, the appellant returned all of said circus equipment to the appellee, and that during the unexpired term of said rental period, namely, a period of four weeks, the appellee endeavored to, and made every effort to, rent said circus equipment, but was unable to do so. That as a consequence of appellant's alleged breach and return of said equipment, the appellee was compelled to feed the animals to its damage in the amount of one thousand six hundred dollars ($1,600.00).

The Answer of appellant admits the execution of the contract, but denies that the appellee has performed all the conditions and covenants on its part to be performed.

That as an affirmative defense, the appellant sets up the fact that on or about the 31st day of May, 1939, the appellant returned all of said equipment to the possession of the appellee, and served the appellee with a Notice of Rescission. [Pr. Tr. pp. 14-26.] There is also included in the answer, a counterclaim for appellant's damages in the amount of $50,000.00.

That the action was commenced in the United States District Court of the Southern District of California, Central Division, pursuant to 28 U. S. C. A., Section 41 (1). The statutory provision relied upon to sustain the jurisdiction of the District Court is 28 U. S. C. A., Section 41 (1). The statutory provision relied upon to give this Honorable Court jurisdiction on appeal to review a judgment of the District Court is 28 U. S. C. A., Section 225, paragraph (a).

The pleadings necessary to sustain the existence of jurisdiction in the District Court are the Complaint [Pr. Tr. p. 2], the Answer [Pr. Tr. p. 14], Reply to Counterclaim [Pr. Tr. p. 26], Amended Counterclaim [Pr. Tr. p. 28], Reply to Amended Counterclaim. [Pr. Tr. p. 32.]

Judgment was entered in the District Court on December 3rd, 1940. [Pr. Tr. p. 46.] Notice of Appeal was filed by appellant on the 16th day of January, 1941. [Pr. Tr. p. 48.] Bond on appeal in the sum of $20,000.00 covering both judgment and costs was filed by appellant on January 16th, 1941. [Pr. Tr. p. 49.]

The typewritten transcript of record in the above entitled cause was filed and docketed in this Honorable Court

on the 29th day of March, 1941 [Pr. Tr. p. 285], which was within the time allowed for the docketing of said transcript, the time therefor having been extended by the District Court in compliance with provisions of Rule 73 of Rules of Civil Procedure for the District Courts of the United States. [Pr. Tr. p. 55.] The typewritten transcript of record was prepared pursuant to a Designation of Record on Appeal and Amended Designation of Record on Appeal in accordance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, the Designation having been filed on the 12th day of March, 1941 [Pr. Tr. p. 52], Amended Designation having been filed on the 13th day of March 1941. [Pr. Tr. p. 54.]

Pursuant to Rule 19, subdivision 6, of the Rules of this Honorable Court, a statement of the parts of the record necessary for the consideration of the case, and a statement of points relied upon was filed on the 2nd day of April, 1941. [Pr. Tr. p. 286.]

The transcript of record was filed in this Honorable Court on the 29th day of March, 1941, and all proceedings having been taken within the time as provided by the rules of Court, and the provisions of the Federal Code, 28 U. S. C. A., Section 230, this case is now before this Honorable Court.

Statement of Case.

The appellee in this case is a corporation engaged in the business of conducting and maintaining circuses and leasing circus equipment. For some time prior to May 23, 1939, this circus equipment was stored at appellee's winter quarters in Baldwin Park, California. [Pr. Tr. p. 66.]

Approximately three or four weeks before the execution of the contract between the appellee and appellant, the agent of the appellee, Ralph J. Clawson, solicited the appellant with the idea of renting to appellant the circus equipment owned by the appellee; that extended negotiations were had regarding the rental of said equipment which culminated in the execution of a contract, attached as "Exhibit A" to appellee's complaint [Pr. Tr. p. 8] and which was stipulated to be the contract executed by the parties. [Pr. Tr. p. 36.]

That at the pretrial hearing, the issues in said cause were limited to the question of whether the equipment was delivered in accordance with the provisions of the contract, namely, whether the equipment was in good condition and ready for use when delivered by the appellee to the appellant at Inglewood, California. The appellant contends that the appellee failed to deliver all of the specified equipment, and that the equipment delivered was not in good condition and ready for use as specified in the contract; that after having used said equipment for a period of one week, appellant found it so completely unsatisfactory that it was impossible for appellant to pursue the

business of putting on and staging a circus. [Pr. Tr. p. 36.]

That on the 31st day of May, 1939, the appellant returned all of said equipment to the appellee at its winter quarters at Baldwin Park and thereupon served the appellee with a Notice of Rescission of said contract. [Pr. Tr. p. 25.]

The appellee introduced evidence attempting to prove that the equipment as delivered was in compliance with the terms of the contract, namely, in good condition and ready for use, but the evidence introduced is so inadequate that it fails to establish any fact upon which a finding by the Court can be sustained.

Appellee's complaint alleged on the contract and set forth two additional causes of action. It was agreed at the pretrial hearing that the second and third causes of action were predicated upon the first, and it was ordered by the Court that the second and third causes of action be dismissed. The trial, therefore, proceeded on the first cause of action only.

Appellee in paragraph IV of its complaint [Pr. Tr. p. 3] made as a part of its case the allegation that after the return of the equipment to the appellee, the appellee made every endeavor during the remaining portion of the rental term to let the property but was unable so to do. No evidence whatever was offered to sustain this allegation.

Specifications of Error.

I.

The Court erred in finding that there had been a waiver by the appellant of the terms of the contract which provided that the equipment when delivered in Inglewood would be in good condition and ready for use.

II.

The Court erred in concluding that a presumption arose because the appellant failed to produce certain physical evidence, to-wit, some rope which was not in appellant's possession but was in the possession of appellee, and in making a finding upon such erroneous presumption.

III.

The finding of fact that the property delivered by appellee to appellant at Inglewood was at the time of delivery in good condition and ready for use, is not supported by the evidence.

IV.

The Court erred in finding that the appellant company engaged in the show business was familiar with the circus business and knew about ropes, and that it must have known how long the rope would likely continue in use. [Findings, Pr. Tr. p. 40.]

V.

The Court erred in finding that there was no dry rot in the rope and that dry rot could not be detected by a person looking at it, and that the witnesses had no special knowledge. [Findings, Pr. Tr. p. 43.]

VI.

The Court erred in finding that there was no evidence that the wagons had been greased or oiled and drawing a conclusion therefrom that they had not been greased or oiled, and at the same time finding that the appellant employed a staff of efficient showmen as heads of the several departments. [Findings, Pr. Tr. p. 44.]

VII.

The Court erred in concluding that the appellant accepted the property "without discovering any fault of any sort or fashion," and then immediately concludes further that the appellant "assumed to make reconditioning for such needed repairs as were apparent."

VIII.

The Court erred in concluding that appellant closed the circus because threatened with a closed shop by labor unions.

IX.

The Court erred in admitting the testimony, over objection of appellant, as follows:

> "Q. What did you do when you arrived at Baldwin Park with relation to examining and making such repairs as were necessary to the wagons? A. Well, I believe that first day I hired a mechanic who was on the Barnes Show, Forbes—I am sure it was the first day—and another man who handled the tractors, and I told them to look over the wagons that we were selecting, one of them to look them

over for the rings, to let them up and down off the train to see if they were all sound, and, if they were not, to get them repaired.

Q. Under your direction and supervision? A. That is so.

Q. Did he report back to you in that connection? A. Yes.

Q. What did he report to you? A. He reported to me that the wagons were usable.

Q. And were there any repairs that were made on those wagons? A. Yes. I told him to make any necessary repairs on the wagons.

Q. Were they in such condition as used circus wagons would normally be in, at such a time? A. Yes.

Mr. Schaefer: I object to that as calling for the conclusion of the witness.

The Court: I think, after what he has stated, his conclusion is proper.

Q. By Mr. Combs: And were they, in your opinion, in good condition and ready for use in the business of the production of a circus at that time? I will withdraw that. At the time of May 23rd, when delivery was made at Inglewood? A. Well, I had used them and we hauled the show out with them.

Mr. Schaefer: I move to strike that answer as not responsive, Your Honor.

Q. By Mr. Combs: In your opinion. Just answer the question.

The Court: Answer the question as propounded.

Q. By Mr. Combs: In your opinion. A. They were in usable condition, yes." [Pr. Tr. pp. 71-72.]

X.

The Court erred in admitting the testimony, over objection of appellant, as follows:

"Q. Did anything occur at Santa Ana with relation to the equipment that was out of the ordinary? A. Yes. We had a long hill there, and I think the pole wagon went over the side of the run.

Q. What was the occasion for that? A. I wasn't there. All I know is the report that it was so.

Q. Who reported it to you? A. The trainmaster —or Pat Graham came down and told me it was reported to him by the trainmaster.

Q. Are you able to say whether or not it went over the side of the run because of some faulty construction of either the wagon or the run? A. I don't know.

Q. Have you ever had opportunity to observe a wagon slip off a run before, in the conduct of a circus? A. Yes.

Q. In fact, that is usually an accident that occurs as a result of wrong turning? A. It could be, if he didn't handle the pole of the wagon properly coming across the platform.

Mr. Schaefer: I move to strike that out, Your Honor. He wasn't there, and he has given what might be a reason.

The Court: He is giving his ideas as a man familiar with this sort of business, and I think it is proper. The court will only give it such weight as it ought to have, anyway." [Pr. Tr. p. 88.]

XI.

The Court erred in admitting the testimony, over objection of appellant, as follows:

"Q. Did you go out to Baldwin Park before the opening day of the circus? A. I did.

Q. Did you examine any of the equipment out there at that time?" [Pr. Tr. pp. 88-89.]

"Mr. Schaefer: Just a minute. I object to that unless it is the equipment used by the Great American Circus.

The Court: It should be limited.

Mr. Combs: It should be. I so qualify my question.

A. Only to the extent that the various wagons that were to be used were identified by Mr. Clawson as 'this' and 'that' and 'this,' and so forth.

Q. By Mr. Combs: Can you state what your observation of their condition was at that time? A. My observations of their conditions were that they were usable.

Q. Were they in good condition, suitable for use for the production of a circus?

Mr. Schaefer: I object to that as calling for the conclusion of the witness, without proper foundation being laid.

The Court: Let us find out what he knows about it. Do you know anything more about them? A. I can only say that they looked to me to be usable." [Pr. Tr. p. 226, line 16, to p. 227, line 10.]

XII.

The Court erred in admitting the testimony, over objection of appellant, as follows:

"Q. Did you have occasion to observe the condition of the flat cars in this circus? A. Very much so.

Q. What was their condition? A. I would say they was good. I have worked on worse.

Q. By Mr. Combs: What was the condition of the runs? A. Very good.

Q. What was the condition of the wagons? A. Good.

Mr. Schaefer: I will object to that and move to strike the answer on the ground that there is no foundation laid for the answer to that question.

The Court: The court will consider it, if it has any value." [Pr. Tr. p. 280, lines 13-27.]

XIII.

The judgment is not supported by the findings in that there is no finding to sustain the allegation of the complaint that the appellee made an effort to mitigate damages as alleged in its complaint.

ARGUMENT.

POINT I.

The Court Erred in Finding That There Had Been a Waiver by the Appellant of the Terms of the Contract Which Provided That the Equipment When Delivered in Inglewood Would Be in Good Condition and Ready for Use.

The Court found that

> "When the defendant accepted the property, after examination and after exposition of the property to him, without discovering any fault of any sort or fashion, and assumed to make reconditioning for such needed repairs as were apparent, and charged it to the plaintiff's account with the plaintiff's consent, he waived such reconditioning as is shown to have been necessary and to have been made,".

The evidence not only does not sustain this finding but on the contrary it is appellant's contention that there is no substantial evidence to support this conclusion.

Under the terms of the contract, the appellee was required at its own expense to deliver all of the leased circus equipment "in good condition and ready for use, to the lessee (appellant) at Inglewood, California, by May 23, 1939". [Pr. Tr. p. 9.] This sets forth the obligation of the appellee, and a determination must be made whether or not this obligation was fulfilled by the appellee. An examination of the evidence indicates that the only substantial proof offered by appellee is that the equipment was ready for use, but there is no proof of that part of the covenant which requires that the equipment be in good condition.

The appellee could not fulfill its obligation in this connection by merely delivering the equipment ready for use at Inglewood without having it in good condition for the period of the contract. This covenant of the contract must be read in connection with the preceding covenant which provides that the lease was for five weeks with an option for renewal for a period which, if exercised, would have made a total rental period of twelve weeks. Good condition could only, therefore, mean in such condition that the appellant could reasonably anticipate the use of the equipment for the term provided.

As a further preliminary, and aid in construing the lease contract between the parties, it must be called to the Court's attention that as the lease was originally prepared the appellee had in mind that the appellant was to acknowledge that it had examined the property, and that the appellee was to make no representation as to its condition or fitness for the use thereof intended by the lessee.

> "8. ~~The Lessee has examined the said property and the Lessor makes no representation as to its condition or fitness for the use thereof intended by the Lessee.~~ (WPD JP.)" [Pr. Tr. p. 11.]

But the appellant did not agree to such a condition and accordingly struck the same from the contract. While paragraph 8 was deleted and became of no effect, yet it is of tremendous aid in construing the intention of the parties. Under the circumstances we submit that the contract must be considered in the light that the appellant had not examined the leased property, and that such representations as to fitness as would ordinarily be implied for the use to which the equipment was intended to be used, must be implied.

Section 1955 of the California Civil Code, provides as follows:

> "One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use."

Therefore, we reiterate that the appellee was required to prove that all of the equipment provided for in paragraph (1) of the contract [Pr. Tr. p. 8] was delivered at Inglewood in good condition and ready for use. The appellant had not examined the property and did not release the appellee from any representation that might have been made as to condition or fitness, and the appellee knew that the equipment was to be used for five weeks and perhaps twelve.

The lower Court's approach to this problem apparently was that the appellant, because it was in the show business, had circus knowledge and an intimate knowledge of ropes [Pr. Tr. p. 40], and that appellant had sent out agents to examine the property at Baldwin Park and to pass on it there.

The Court found as a fact that there had been a waiver by the appellant of the terms requiring the equipment to be in good condition and ready for use. [Pr. Tr. p. 45.]

It is evident that the parties considered the matter of waiver and expressly eliminated such a provision. In order to interpret the contract and ascertain the effect of the language it is necessary to consider it as a whole. Furthermore, in determining whether there has been a waiver of any term of the contract, it is of utmost im-

portance to have a complete understanding of the facts which operated upon the minds of the parties in executing that particular instrument.

It is said in *Lemm v. Stillwater Land & Cattle Co.*, 217 Cal. 474, at 480,

> "A court must look at the contract as a whole and give to each particular clause thereof the modification or limitation or qualification which it is evident from the other parts of the contract the parties intended. (See 1641, Civ. Code; Ogburn v. Travelers Ins. Co., 207 Cal. 50, 53 (276 Pac. 1004); Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 238 (44 Pac. 561, 53 Am. St. Rep. 210); 6 R. C. L. p. 834 *et seq.*) In the interpretation of contracts the duty of the court is to ascertain the intent of the parties. Although the language of the contract must govern its interpretation (Civ. Code secs. 1638, 1639), nevertheless the meaning is to be obtained from the entire contract and not from any one or more isolated portions thereof. (Hunt v. United Bank & Trust Co., 210 Cal. 108, 115 (291 Pac. 184); Kennedy v. Lee, 147 Cal. 596, 601 (82 Pac. 257); Eastman v. Piper, 68 Cal. App. 554 (229 Pac. 1002; 13 C. J. p. 525).) To assist it in the performance of this duty the court may look to the circumstances surrounding the parties at the time they contracted (Civ. Code, sec. 1647; Ogburn v. Travelers Ins. Co., *supra,* at p. 52; Smith v. Carlston, 205 Cal. 541, 550 (271 Pac. 1091); Henika v. Lange, 55 Cal. App. 336, 339 (203 Pac. 798)), including the object, nature and subject matter of the agreement (6 R. C. L., pp. 836, 837, Eastman v. Piper, *supra,* at p. 565; Canal Co. v. Hill, 82 U. S. 94, 100, 101 (21 L. Ed. 64)), and the preliminary negotiations between the parties (6 R. C. L., p. 839), and thus place itself in the same situa-

tion in which the parties found themselves at the time of contracting. (Code Civ. Proc., sec. 1860; 6 R. C. L., p. 849; Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 273 (86 Pac. 509, 691); Blaeholder v. Guthrie, 17 Cal. App. 297, 300 (119 Pac. 524).)"

The intention of the parties can be clearly ascertained from the fact that the provision providing that the appellant waive his right to demand that the equipment be delivered in good condition was stricken from the terms of the contract. This immediately impels us to the contrary conclusion in regard to waiver of the expressed terms of the contract. If there has arisen such a waiver it must be demonstrated by other facts and circumstances which give rise to a presumption of more force than the intention expressed by these actions in revising the terms of the contract.

In *Ogburn v. Travelers Insurance Co.,* 207 Cal. 52, the Court in the following language states that it is of primary importance to ascertain the intentions of the parties and to carry them out by enforcing the terms of a contract.

"In the interpretation of a written instrument the primary object is to ascertain and carry out the intention of the parties thereto. (Burnett v. Piercy, 149 Cal. 178, 189 (86 Pac. 603); First Nat. Bank v. Bowers, 141 Cal. 253, 262 (74 Pac. 856).) This fundamental rule finds recognition in section 1636 of our Civil Code, wherein it is provided that 'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' As to the hardships, advantages or

disadvantages which may result from such a construction, the courts have nothing to do. (Gazos Creek etc. Co. v. Coburn, 8 Cal. App. 150, 156 (96 Pac. 359).) The intention of the parties is, of course, to be ascertained from a consideration of the language employed by them and the subject matter of the agreement. (Los Angeles Gas & E. Co. v. Amalgamated Oil Co., 156 Cal. 776, 779 (106 Pac. 55).) A contract should be construed, however, as an entirety, the intention being gathered from the whole instrument, taking it by its four corners. Every part thereof should be given some effect. (Sec. 1641, Civ. Code.) In other words, 'the sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus;* that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done.' (Balfour v. Fresno C. & I. Co., 109 Cal. 221, 227 (41 Pac. 876, 878).) Section 1648 of the Civil Code declares that 'However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.' "

All the evidence given at the trial of the cause, indicates quite the contrary to any presumption of waiver on behalf of the appellant of the terms of the contract. The fact that the agents of the appellant were at Baldwin Park laying out the show, does not indicate that appellant was not entitled to rely upon the express language of the contract.

In the case of *Craig v. White,* 187 Cal. 489, the problem presented parallels the present case in many respects. It was held therein that although the presence of an opportunity on behalf of the plaintiff to investigate the title to land existed, nevertheless he was not precluded from demanding that a good title be conveyed to him. The Court makes the following observations in respect to the requirements to constitute a waiver:

> "We have been referred to no authority which holds that mere opportunity to investigate title before entering into a contract of purchase, and the implied approval of the title offered by subsequently entering into the contract, constitutes a waiver of the obligation of the vendor to furnish title on tender of the final payment. The fact of inspection and approval by the plaintiff here of the deed offered for escrow has no significance, because the deed itself was regular on its face and purported to convey the title to the land contracted for.
>
> "An examination and acceptance of an imperfect title precedent to entering upon a contract to purchase, by express agreement or under circumstances giving substantial advantage to the purchaser, or operating to the detriment of the vendor, might operate as an estoppel.
>
> "But even an express agreement to buy and pay for land to which it was known the vendor had no title whatever would be void for want of consideration.
>
> "Here there is no claim of an express waiver, and there are no circumstances to sustain an equitable estoppel of the purchaser.

"It is entirely clear that both parties contracted on the belief that the defendant had and could convey title to the land. The plaintiff, although it does not so appear of record, presumably made some search or inquiry. The record title appeared to be in defendant. The plaintiff, by entering upon the contract to purchase, impliedly, at least, expressed himself as satisfied that the title was good. We are of the opinion that this did not preclude him from rescinding while the contract was still executory, and not merged in an executed and delivered deed of conveyance, when he discovered that the defendant had no title whatever and could not make such conveyance.

"As is said in Ruling Case Law (27 R. C. L., p. 908), 'To constitute a waiver within the definitions given, it is essential that there be an existing right, benefit or advantage; a knowledge, actual or constructive, of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights, unless waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them.' And again: 'In the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.' "

There is no indication throughout the entire testimony contained in the record, that the appellee was misled in any way to his prejudice by any belief created that there was a waiver on behalf of the appellant.

In *Kadow v. City of Los Angeles,* 31 Cal. App. (2d) 324 at 329, the Court states that there must be such a showing.

> "Appellant Smith's contention, which appears for the first time on appeal, in substance to the effect that the failure to file a written claim with him, the officer, within ninety days after the accident constituted a waiver, is without merit. It is the general rule that a party to an action who relies upon a waiver must specially plead such waiver. (25 Cal. Jur., p. 931.) Moreover, 'In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to;' also, 'A waiver is the intentional relinquishment of a known right with knowledge of the facts.' (Cal. Jur. *supra,* pp. 926, 928.) There is no justification for the application of the doctrine in the case at bar."

The record is replete with evidence that the appellant and its agents were protesting the deficiencies in the equipment to the agents of the appellee and reporting deficiencies and demanding that they be repaired. [Pr. Tr. pp. 164, 165, 166, 172, 174 and 175.]

In the case of *Linnard v. Sonnenschein,* 94 Cal. App. 729, it is stated by the Court:

> "The 'waiver' defense urged is based upon the acceptance by plaintiff of various sums on account of the rent of the premises after the notice changing the terms of the tenancy and the notice to quit. Acceptance of rent after a notice changing a tenancy or after notice to quit does not necessarily operate to waive the notice. While the unconditional acceptance by a landlord of moneys as rent, which rent has accrued after the time the tenant should have surrendered possession will constitute strong evidence of the landlord's waiver of the notice to quit, waiver always rests on intent and is ever a question of fact."

Such language clearly indicates that an unconditional acceptance might constitue a waiver and is strong evidence thereof, but in face of the constant protestations of the agents and officers of the appellant it cannot be said that there was an unconditional acceptance of the equipment. Such evidence is not disputed and stands uncontradicted in the record. A finding contrary to such evidence in view of the law cannot be sustained. Furthermore, from a reading of the record it may appear that all of the deficiencies in the equipment were present and apparent at the time of the delivery in Inglewood. This is not the case. Deficiencies set forth in the notice of rescission became evident day by day during the week's possession by the appellant. The appellant's decision at Inglewood to go on was based only on a knowledge of the existing deficiencies.

POINT II.

The Court Erred in Concluding That a Presumption Arose Because the Appellant Failed to Produce Certain Physical Evidence, Towit, Some Rope Which Was Not in Appellant's Possession But Was in the Possession of Appellee, and in Making a Finding Upon Such Erroneous Presumption.

The finding:

> "No part of the broken rope is produced in court as evidence, nor is its absence explained. There is testimony [37] that the weakness in the rope was dry rot, but little weight can be attached to those statements, because a rope so afflicted could not be detected by a person merely looking at it, as the testimony shows these witnesses did. They had no special knowledge with relation to it. And the witness who spliced the rope testified in this case, but he did not say anything about any dry rot or any appearance at the broken place of the rope of any unusual condition. The non-production of that, of course, would indicate the contrary idea to the dry rot." [Pr. Tr. p. 43.]

is not supported by the facts or the law.

The Court in drawing the presumption evidently had in mind California Code of Civil Procedure, Section 1963 (5)

> "That evidence wilfully suppressed would be adverse if produced."

It is evident from the reading of this section, that before such a presumption can arise, there must be a showing of wilfull suppression of the evidence. All the equipment used by the appellant was returned to the appellee,

and it remained in its possession. It is, therefore, impossible to presume that there was any suppression, wilfull or otherwise, on the part of the appellant, and that the means of production of the rope in Court were not within the powers of the appellant.

In the case of *Estate of Moore,* 180 Cal. 570, at 585, it is said:

> "The court gave the familiar instruction with respect to the presumption of law that evidence wilfully suppressed would be adverse if produced. This was error because the record fails to disclose any instance of suppression of evidence or anything that could be properly construed as such withholding of facts in defendant's possession. That, under the circumstances, the error was prejudicial there can be no doubt, and this is emphasized when we note that one of the counsel for respondents, in his argument, sought to apply the rule subsequently announced in the instruction to the circumstance that no person named in the will had been called as a witness."

In *Hiner v. Olson,* 23 Cal. App. (2d) 227 at 234, the Court quotes 10 *Cal. Jur.* 779, Section 86, as follows:

> "When the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which, from its very nature, must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, a presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary."

It is quite evident from the testimony, that the condition of the rope played a considerable part in the evidence offered on behalf of appellant to show that the equipment was in good condition and ready for use. It became a material issue in the case, sufficient for the Court to make a specific finding in that regard. The indication of the Court that its finding was based on a presumption, which if given to a jury in an instruction would have been clearly erroneous, is prejudicial to the appellant and is error sufficient to warrant a reversal of the case.

In *Tieman v. Red Top Cab Co.,* 117 Cal. App. 40, at 46, the Court states as follows:

> "Appellants' failure to offer any evidence on these issues, although obviously the best advised, requires that the above evidence 'be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict'. (Code Civ. Proc., sec. 2061, subd. 6.) 'It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary.' (Bone v. Hayes, 154 Cal. 759, 765 (99 Pac. 172, 175); Alloggi v. Southern Pac. Co., 37 Cal. App. 72 (173 Pac. 1117); Perry v. Paladini, Inc., 89 Cal. App. 275 (264 Pac. 580).)"

POINT III.

The Finding of Fact That the Property Delivered by Appellee to Appellant at Inglewood Was at the Time of Delivery in Good Condition and Ready for Use, Is Not Supported by the Evidence.

In order to determine whether this finding is supported by any competent evidence, we deem it advisable to review and sumarize for the Court the testimony of the witnesses touching on the condition of the equipment and its fitness for use.

Paul Eagles testified that he was a merchant. [Pr. Tr. p. 63.] In a written statement which was made to counsel for appellant, and returned to Mr. Marco of the appellant corporation in Mr. Eagle's letter of June 28th [Appellee's Exhibit No. A-2, Pr. Tr. p. 112] the letterhead of the witness is not reproduced, which would disclose the business of the witness, but it will be noted from this exhibit that the statement, which appears in the typewritten reporter's transcript of testimony page 341, shows that the witness is engaged in the feed and fuel business. This statement is in no wise repudiated, but the witness states it does not meet with his approval because it is just a recitation of events that happened on the road, and that it should be more complete.

To qualify this witness as to his knowledge of the equipment, it is shown by his testimony that he was the sublessee of said equipment from November, 1938, until around March, 1939. [Pr. Tr. p. 70.] However, when the equipment was to be taken out by the appellant he hired a mechanic to look over the equipment, and it was reported to him that the wagons were useable. [Pr. Tr. p. 72.] Over objection [Pr. Tr. p. 72] the witness was allowed

on such foundation to give his opinion regarding the condition of the wagons.

The witness states that he did not make a personal examination of the tent rigging, blocks, and falls. [Pr. Tr. p. 73.]

The witness testified as to the condition of the seats and chairs, and stated that he had used them on previous occasions, but he did not state that they were in useable condition as of the time they were delivered to Inglewood. [Pr. Tr. p. 73.]

The knowledge of this witness with respect to the wardrobe was acquired from a report of a subordinate that there were certain items missing and that it needed cleaning. [Pr. Tr. p. 73.]

The sleeping cars were without blankets, sheets or pillow cases, and there were no berth curtains. [Pr. Tr. p. 74.] The witness did not know whether any of these materials were furnished except that berth curtains were obtained in San Diego. [Pr. Tr. p. 75.]

In regard to the supplying of elephant howdahs, this witness testified that he had no discussion regarding them; that he does not remember any request having been made for their delivery. [Pr. Tr. p. 75.]

When this witness was questioned regarding his knowledge of the condition of the equipment prior to leaving Baldwin Park, he stated that it is true that he selected the equipment and knew either from his own knowledge or from the knowledge of subordinates as near as possible as it was for anyone to know from that extent of the equipment loaded in three days. [Pr. Tr. p. 78.] The rest of the testimony of this witness concerns the operation of the

circus subsequent to the time of the delivery of the equipment, and if bearing upon other points will be discussed under those topics.

On cross-examination, the witness was questioned regarding his knowledge of the equipment and in respect to the wagons he stated that he examined them only in a general way. [Pr. Tr. p. 101.] He did not examine the axles or boxings; that he selected them merely for size and their ability to carry load. [Pr. Tr. p. 101.]

In respect to the train decks, this witness states that generally speaking they were in good condition, but repairs were made both at Inglewood and San Diego. [Pr. Tr. p. 102.]

In regard to the condition of the rope, this witness said that it was neither good nor bad, that it would be medium, and when asked if he remembers making the statement that the ropes were all in very poor condition [Rep. Tr. p. 343, line 3, to p. 344, line 2], he could not recall. [Pr. Tr. p. 107.]

This witness further stated on cross-examination that it is possible that he made the statement; that he knew the elephant howdahs never arrived; that the wardrobe was in bad condition, some entirely unuseable. [Pr. Tr. p. 107.]

In considering Mr. Eagles' testimony these facts must be kept in mind:

Although working for appellant, he was called by appellee as an adverse witness [Rep. Tr. p. 9, line 10, to p. 50, line 6] and examined under the broad latitude of cross-examination. He was not an adverse witness and there was no showing to justify such examination. It is apparent that the witness was in conference with appellee's

counsel, and that at the same time he refused to discuss the matter with appellant's counsel. [Rep. Tr. pp. 50-55.] Calling the witness as an adverse witness was done to give his testimony the effect of having been wrested from the appellant, and reluctantly given, while appellee would make it appear that the witness was adverse to appellee. The fact is, Mr. Eagles was a very willing witness for appellee, no doubt because this was appellant's only circus venture, while appellee would require feed for the animals for a long time to come.

Furthermore, the witness had difficulty in stating anything particular that had been discussed with appellee's counsel and could only generalize. Is it not more reasonable to assume that his statement made to counsel for appellant on June 13, 1939 [Rep. Tr. p. 341, line 16] within two weeks after the circus closed and the equipment was returned, is more apt to be in line with the facts, than his testimony offered at the trial, which was November 27, 1940, a few days lacking a year and a half after the close of the circus. And the witness never did deny the statement! In returning it to Mr. Marco, he said that it didn't meet with his approval because "it is just a recitation of events that happened while the Great American Circus was on the road and I believe it should be more complete if it is to be submitted to use in the settlement of a claim". [Rep. Tr. p. 345, line 11.]

Not an untrue recitation of events, but incomplete. Counsel that took the statement testified concerning it [Rep. Tr. p. 340] and while it may be said this testimony is not entitled to any greater credence than any other testimony, yet the Court should take into consideration that counsel was an officer of the Court in which he was testifying and had been so for many years. Furthermore,

counsel's testimony is fully corroborated by his secretary. [Rep. Tr. p. 336, line 26.]

The cross-examination of Mr. Eagles with respect to the statement he made on June 13, 1939, is interesting. [Rep. Tr. pp. 73-83.] Some of this testimony is reproduced:

> "Q. These are the same questions I have heretofore asked you, and very briefly I will refer to this, because it is the only time you and I ever had a conference, and it was in my office on June 13th, 1939, in my presence and in the presence of my stenographer. Did you say, 'It took us about an hour and a half to get the wagon up, and this delayed us in our show, causing us to miss the afternoon's performance entirely'? A. I didn't, because I wouldn't have made that statement, because I called the show in the afternoon at Santa Ana.
>
> Q. Did you state, 'Another reason for our delay was occasioned by a wagon carrying the big top side poles to run hot'? A. That was the wagon that had the side poles on it.
>
> Q. Did you state to me that, 'Another reason for our delay was occasioned by a wagon carrying the big top side poles to run hot'? A. That doesn't make much sense. That isn't good language there, that I can understand, on that statement you just read.
>
> Q. Do you wish me to read it to you again? A. If you will, please.
>
> Q. 'Another reason for our delay was occasioned by a wagon carrying the big top side poles to run hot'. A. Anyway, the wagon—
>
> Q. Did you make that statement to me at the time stated? A. I don't believe so.

Q. Did you say, 'The axles were not in proper alignment and the wheels, instead of slanting in at the bottom, were slanting out, causing friction in the wheel box'? Did you so state to me? A. I wasn't making statements to you.

Q. Did you make that statement to me in my office at the time stated? Will you please tell me, if you can? A. I can't recall.

Q. You don't recall? A. No.

Q. I will ask you if, at the time heretofore stated, you didn't make the following statement to me: 'In leaving Santa Ana the rope on the No. 4 broke. This was due to the poor condition of the rope, causing one of the main center poles to fall. No one was injured, fortunately'? A. No. 4 what? That is not a very complete sentence.

Q. I don't know. A. Neither do I.

Q. I am saying only what you told me. I can't change it. 'In leaving Santa Ana the rope on the No. 4 broke. This was due to the poor condition of the rope, causing one of the main center poles to fall. No one was injured, fortunately.' A. There is something out of that sentence. It might have referred to No. 4 pole.

Q. All right. Did a No. 4 pole fall or break or cause any trouble? A. I don't remember.

Q. You don't remember? A. No.

Q. My question is, did you so state to me? A. I know I didn't make that statement, just 'No. 4'. I know I didn't make that.

Q. Did you make the substance of that statement in a little different form to me?

Mr. Combs: That is objected to as not proper cross-examination.

The Court: Yes. I will have to sustain that objection.

Q. By Mr. Schaefer: Your answer is then, that you did not make that statement, do I understand?

The Court: I so understood him to say.

Mr. Combs: That is what he said.

Q. By Mr. Schaefer: All right. Did you say to me at the same time: 'another wagon ran hot on the way to the train at Santa Ana, causing a further delay'? A. It was the same wagon.

Q. Did you make that statement? A. I don't believe I did. It was the same wagon, going and coming, that we had trouble with.

Q. I will ask you if you remember stating to me, on the same occasion, 'As a result, we didn't get out of Santa Ana until 6:30 a. m., whereas we should have been out not later than 3:00 a. m. Accordingly, we arrived in Pasadena on Memorial Day around 10:00.' Did you so state to me? A. Those are about the figures, but I can't recall the conversation.

Q. By Mr. Schaefer: Then did you tell me as follows: 'We greased all the wagons causing us trouble on the flat cars, but nevertheless on the trip from the train to the lot in Pasadena, which is a long haul, we had wagon trouble—wheels smoking and causing delay.' Did you so state to me? A. I don't remember, and I don't remember the trouble with the wagons.

Q. Did you have any difficulty in the erection of the equipment in Pasadena? A. Yes.

Q. What difficulty did you have? A. The rope broke three times.

Q. The rope broke three times? A. Yes.

Q. Did the main falls break? A. That is the main falls.

Q. Will you explain for the benefit of the court what are meant by the main falls? A. That is the rope that pulls the tent up to the top of the center pole.

The Court: The center pole? A. Yes, the center pole.

Q. By Mr. Schaefer: Block and falls is similar to what is known as block and tackle, isn't it? A. That is right.

Q. Did any of the performers refuse to perform that evening? A. Why, they didn't, after an explanation. They started to refuse.

Q. Did any of them come to you and tell you they wouldn't go out? A. Yes, Walter Guice.

Q. What Walter Guice is that? A. He had the aerial bar.

Q. The aerial bar? A. Yes.

Q. Did anybody else refuse to go up? A. I don't think anybody else actually refused. Ernie White was standing there with him.

Q. Did he refuse to go up? A. I don't believe he did. He was standing there.

Q. What is his act, Ernie's? A. An upside down balancing act.

Q. Stood on his head in a trapeze? A. That is right.

Q. Did these performers finally go up? A. Yes.

Q. Did you have to make some rearrangement of the equipment? A. No. It had already been made by George Singleton.

Q. What was it that was done? A. He just made fast their bars, so that they couldn't fall down on top of them.

Q. How did he do that? A. I believe with a chain or rope, or something like that.

Q. It wasn't the ordinary way that the equipment was ordinarily fastened? A. It has been done before.

Q. It isn't the ordinary way, though, is it, Mr. Eagles? A. Not the ordinary way, no.

Q. What was the condition of the rope in Pasadena? Was it good or bad? A. Just like any second-hand rope.

Q. Would that be good or bad? A. It would be medium.

Q. Do you remember telling me on the occasion mentioned, 'The ropes were all in very poor condition'? Did you so state to me? A. I can't recall it.

Q. Do you remember stating to me, 'While we had some green labor, yet the equipment itself delayed us tremendously'? Did you so state? A. I don't recall that part of the conversation.

Q. The elephant howdahs never came out, did they? A. No, not to my knowledge.

Q. What condition was the wardrobe in? A. I didn't examine it personally. George King did, the wardrobe man.

Q. Did you see the wardrobe at all? A. I saw it in the fall.

Q. How did it look? A. Well, all right. There were some additions made to it at different times.

Q. Who made the additions? A. I believe Fanchon & Marco.

Q. Was some of the wardrobe unusable? A. We didn't take all the wardrobe. I don't know whether it was unusable or not.

Q. Did you state to me at the time mentioned, 'I know that the elephant howdahs never arrived; that the wardrobe was in bad condition, some entirely unusable'? Did you so state? A. I might have. I probably told you that."

We submit that the interest of the witness and this impeachment, renders his testimony of little value, and at any event, it was highly improper and error to permit Eagles to be examined as an adverse witness.

The witness, Charles W. Nelson, testified that prior to the 23rd of May, he had been to Baldwin Park and observed that some of the wheels appeared as though they had dried out in the sun. [Pr. Tr. p. 116.] He further states in response to an inquiry as to whether the equipment was useable or unuseable that he thought it was useable from observation and his slight knowledge of what technical details are necessary for the production of a performance. [Pr. Tr. p. 117.]

It must be observed that the evidence as given by these witnesses was gained from hearsay, that neither had made a thorough examination of any part of the equipment, nor in fact was either hired for this purpose; that any inspection of the equipment, especially pertaining to the seats and chairs, had been made at previous times and not within the time before the equipment was delivered on the 23rd day of May, 1939. The evidence of Eagles also shows that there was in fact some equipment missing and that the same was not supplied until subsequent to the date of delivery; that there were in fact repairs made to the equipment shortly after its delivery.

The most important and persuasive argument showing that the evidence given by Charles W. Nelson is entirely incompetent, and that a finding of fact based thereon is entirely unsupported, is that from his own admission he states that he has a slight knowledge of the technical details necessary for the production of a show; and that

with this slight knowledge he concluded the equipment was useable. This is clearly an expression of opinion evidence, some of which was admitted over the objection of the appellant, and it is shown that from the basis of the witness' opinion, the evidence is highly incompetent and not worthy of consideration by the trier of facts.

That such equipment was useable is far short of a compliance with the terms of the contract. It is self-evident that a piece of equipment may be useable, but not be in good condition such as was in the contemplation of the parties when this contract was made.

The contract was made with the purpose in mind that appellant would operate a circus as a going business for from five to twelve weeks. Much more was in the minds of the parties than that the equipment should be useable —it was expressly provided that it must be in good condition and ready for use in the production of an operating circus.

The next witness whose evidence we must consider is that of George Singleton, called on behalf of the appellee. The witness was questioned regarding the condition of the wagons and testified that they were in fairly good shape, suitable for the transportation of a circus; that they were second-hand equipment. [Pr. Tr. p. 125.]

It was stated by the witness that in Santa Ana there was trouble with one of the wagons going on to the lot and that the same wagon gave them trouble the next day. [Pr. Tr. p. 129.]

It will be noted that the testimony of this witness is in itself contradictory, for the witness states that the wagons are in fairly good shape and then in response to a question covering the same facts, states that they are in good condition and ready for use. [Pr. Tr. pp. 132 and 134.]

In regard to the rest of the equipment, this witness makes no affirmative statement, except that he does state [Pr. Tr. p. 134] that he did inspect the tent rigging, blocks, falls and chairs.

This witness had also been in the employ of appellant. He had a suit pending against appellant and counsel for appellee was also his counsel. [Rep. Tr. p. 118.] He made a statement on June 6, 1939, within one week after the equipment was returned. [Rep. Tr. p. 332, line 5.] Mr. William Gamble, of counsel for appellant, testified concerning the taking of this statement. [Rep. Tr. p. 329.] This was substantiated by the stenographer. [Rep. Tr. p. 336, lines 8-25.]

The testimony of Ralph J. Clawson states that he did inspect the 20 wagons that were delivered at Inglewood, and in response to a question whether they were in good condition and ready for use, the witness responded that they were in useable condition and could be used. [Pr. Tr. p. 143.]

In regard to the train flat decks and runs, the witness states that there were some places that were bad, but that they decided they could fix it up at San Diego. [Pr. Tr. p. 144.]

The witness thinks that the Calliope was useable, but states that it was dropped at its delivery in Inglewood and that it did not play the rest of the time. [Pr. Tr. p. 144.] This witness also testified that the wardrobe was in useable condition and that the sleeping cars were clean and in good condition, but that the sleeping cars were not fully equipped. [Pr. Tr. pp. 146-147.]

The witness testifies in regard to the runs and flat cars that they were in good condition; that the runs were new

in 1938, and that it was very good equipment. [Pr. Tr. p. 157.]

On cross-examination this witness was far from positive in his statements and contradicted himself by qualifying his answer to the effect that the equipment was useable—that it was good enough to use, that it could be used, but the witness did not commit himself to the effect that the equipment was in good condition and ready for use at the time of delivery. [Pr. Tr. p. 158.]

It is submitted that the evidence as presented by this witness considered as a whole, cannot be the basis for finding that the equipment was in good condition and ready for use as contemplated by the terms of the contract. The testimony of this witness fully covers the conditions under which the circus was operated and such testimony fully contradicts any evidence that the equipment was in good condition for if it had been such the method of operation would have not been so fraught with trouble and disappointment as related throughout the testimony of all the witnesses.

The witness, J. V. Austin, testified in regard to the custom of renting railroad coaches to circuses in order to show that it was not necessary for the appellees to furnish the sheets, pillow cases and blankets. [Pr. Tr. p. 225.]

However, as a basis for this testimony on cross-examination, it was revealed that this witness had rented circus sleeping equipment on two previous occasions and it was upon this experience that he based the custom. [Pr. Tr. p. 232.]

The witness was asked his opinion regarding the condition of the equipment and was allowed to testify over

the objection of appellant, that it *looked* usable. [Pr. Tr. p. 227.] He based his opinion on an observation made on one visit to the winter quarters at Baldwin Park prior to the 23rd day of May. When asked on cross-examination, the witness stated his knowledge insufficient to give an opinion. [Pr. Tr. p. 232.]

It is submitted that such evidence was highly incompetent and could not be made the basis of any finding of fact.

In reviewing the evidence of the witnesses, we consider that while the testimony of Murray Pennock and Patrick Graham was given on rebuttal, yet it should be considered here in analyzing the plaintiff's evidence to sustain the findings.

Murray Pennock testified that he had examined the equipment six weeks previous [Pr. Tr. p. 260], for the purpose of using it in fiilming a motion picture. [Rep. Tr. p. 390.] The witness stated that after making the examination for the purpose explained, that the wagons were in comparatively good condition, suitable for use. [Pr. Tr. p. 262.] That the flat cars were in equally good condition. [Pr. Tr. p. 262.] The riggings, tent, drop and falls he did not examine.

The witness testified that at the opening of the show in Inglewood, that he thought the equipment was in perfectly usable condition, so much as he saw of it, but he stated that he looked the show over generally. [Pr. Tr. p. 263.]

On cross-examination this witness testified that he did not take any of the wheels off of the wagons [Pr. Tr. p. 266]; that he was not interested whether the wagons had brakes or not; that his interest in the flat cars was for

the purpose of making miniatures for motion picture reproduction. [Pr. Tr. p. 266.]

This witness after testifying to the condition of the cars, on cross-examination acknowledged that he knew of many defects which existed. [Pr. Tr. p. 267.]

Furthermore, the witness' use of the equipment was confined to filming in the making of a motion picture. Of course, the equipment was all right to look at, and answered the purpose perfectly in giving circus atmosphere to a motion picture. But such use is not comparable to a use in transit.

The witness, Pat Graham, who was porter of the sleeping cars, stated that he cleaned them. [Pr. Tr. p. 277.] They intended to sleep 267 people and the only equipment was 67 sheets. [Pr. Tr. p. 279.] As to the cleanliness of the equipment, the witness stated that they were fairly clean; that berth curtains were not obtained until they reached San Diego. [Pr. Tr. p. 279.] Without any foundation as to the knowledge of the witness concerning the condition of the wagons and the runs, he was allowed to give his opinion as to their condition. [Pr. Tr. p. 280.] Over objection of appellant, the Court refused to strike out the answers.

This is a summary of all the pertinent evidence in the transcript regarding the condition of the equipment, and its arrival in Inglewood, and upon its delivery to the appellant.

One of the conditions in the contract [Pr. Tr. p. 8] to be performed on behalf of the appellee was that such equipment should be in good condition and ready for use. The appellee so alleged in his complaint, and by this testimony as above summarized, attempted to prove that as an element necessary for recovery in this cause of action.

Throughout the testimony, as recorded in this record, it is shown that the appellant relied upon this representation of the appellee; that the equipment would be in good condition and ready for use because of the fact that they had made commitments with sponsors and had become obligated to produce a circus or become liable in damages on contracts with the sponsors. [Pr. Tr. p. 250.]

It is quite evident from this testimony that the appellee has not performed the obligation under its contract. As shown by the testimony of the witnesses for the appellant [Pr. Tr. pp. 163, 172], promises were repeatedly made on behalf of the agents for the appellee that the equipment would be put in condition and repair so that the appellant could continue the operation of the circus. It is shown that upon these representations the appellant continued to operate the circus for a period of one week and by the testimony of appellee's own witness, there was delay after delay occasioned by faulty equipment. The appellant was forced to miss performances which caused a substantial reduction in all its receipts and which made the operation of the circus absolutely impossible.

Appellant relied upon these representations that the circus equipment would be in good condition and ready for use, and it was impossible for the appellant to discover some of the latent conditions until after it had had the equipment in its possession for a period of time. It was for that reason, that the appellant continued to operate the circus for a period of a week before exercising its right to rescind. A substantial effort to comply with its provisions of the contract, and an attempt to put the equipment in good condition so that it would be possible for it to operate, was made before the appellant returned the equipment and rescinded the contract.

POINT IV.

The Court Erred in Finding That the Appellant Company Engaged in the Show Business Was Familiar With the Circus Business and Knew About Ropes, and That It Must Have Known How Long the Rope Would Likely Continue in Use. [Findings, Pr. Tr. p. 40.]

It is evident that in this finding the Court misunderstood the testimony with respect to the knowledge of the appellant company and its officers regarding their knowledge as to the operation of the circus business, and also with the knowledge as to the condition of the circus equipment. There is no testimony on behalf of the witness Marco Wolff, that he knew anything with respect to the operations of a circus.

In respect to the testimony of Wayne Dailard, who was the coordinator or general manager of the circus, his knowledge is found in the following testimony [Rep. Tr. pp. 236-237]:

> "Q. By Mr. Schaefer: Mr. Daillard, what is your business or occupation? A. I am in the amusement business.
>
> Q. How long have you been in that business? A. 20 years.
>
> Q. Were you ever employed by Fanchon & Marco? A. Yes, sir.
>
> Q. When? A. Early in 1939.

The Court: You say the amusement business. There are many kinds of amusements. What particular line? A. Theaters, principally.

The Court: Theaters? A. Theater business, that is right.

The Court: Show business? A. Yes.

The Court: Circus? A. No.

Q. By Mr. Schaefer: Were you employed by Fanchon & Marco in connection with the Great American Circus? A. Yes, sir.

Q. What position did you have with the Great American Circus? A. I acted as the coordinator or general manager.

Q. What is a coordinator? A. I was the contact between the actual circus operation and the office."

Even considering the testimony of Paul Eagles and George Singleton, who very obviously were prejudiced against the appellant, there is no showing that either one of these men was particularly familiar with the condition of ropes. They were, it is conceded, experienced in the operation of a circus. It is undoubtedly true that the defendant was engaged in the show business, and had had a great deal of experience in the production of stage and theatrical performances; however, this would not endow them with the knowledge of circus operation. Is it not logical that for this reason paragraph 8 was deleted from the contract?

POINT V.

The Court Erred in Finding That There Was No Dry Rot in the Rope and That Dry Rot Could Not Be Detected by a Person Looking at It, and That the Witnesses Had No Special Knowledge. [Findings, Pr. Tr. p. 43.]

The Court finds [Pr. Tr. p. 43]:

> "There is testimony that the weakness in the rope was dry rot, but little weight can be attached to those statements, because a rope so afflicted could not be detected by a person merely looking at it, as the testimony shows these witnesses did. They had no special knowledge with relation to it. And the witness who spliced the rope testified in this case, but he did not say anything about any dry rot or any appearance at the broken place of the rope of any unusual condition. . . . At the time of the breaking of the rope the man who was in charge of that department was an old showman. He was working in his line of business in making this exhibition. If that had broken because of dry rot, he would have discovered it, and he would have reported it to the defendant, and a part of the rope, or the broken part, would have been saved as a matter of protection to the defendant. But this was not done."

The Court has utterly failed to understand the testimony. Every portion of this finding is entirely without support.

We shall consider the finding in its several parts, and the testimony with respect thereto:

First, the Court says, little weight can be attached to the statements that there was dry rot because this could

not be detected by looking at it, and that the witness had no special knowledge with relation to it. There are three witnesses that testified to the dry rot:—Walter Guice, Charles H. Priest, Jr., and George Singleton, the man refered to as the old showman.

Guice's deposition was taken, and he was subjected to cross-examination. He says that he has been in the show business for many years, and that he and his family have an aerial act. It is his business to know about rope because his and his family's lives depend upon what he knows about rope. He established himself as an expert.

"Q. What type of act was that that you had? A. Horizontal bars, aerial act, with four people.

Q. Can you explain the type of equipment that that act called for? A. Called for pulley blocks and ropes and steel cable, steel pipe and hickory bars.

Q. Are you familiar with the various kinds of ropes used in the circus? A. I am.

Q. How long have you been familiar with the type of ropes used in the circus? A. I acquired that knowledge through a period of about thirty years." [Rep. Tr. p. 366.]

"Q. Did you attend to the putting up of your equipment at Pasadena at night? A. I did.

Q. Did you notice anything about the equipment that was different? A. No; the only thing is I refused to go up in the main falls of the big top, and I informed the manager I refused to let anyone of my people go up in them.

Q. Can you tell us what the main falls are? A. The main falls holds the big top and the riggings.

Q. What is a fall? A. Pulley block and rope.

Q. That holds the main circus tent? A. That is right, and the canvas and the rigging; there is four of them. They had a four-pulley top, one at each pole.

Q. Is that the rope upon which all the riggings of the various acts and equipment are supported? A. Yes, sir, where all the big riggings is hung. and then they have a ring that they hang on the quarter pole.

Q. And your rigging was supposed to be hung onto what? A. From the pole ring of the big top.

Q. Why did you refuse to go up that night? A. The main fall on the center pole on which our rigging was hung was bad and I wouldn't take no chances on it.

Q. What was wrong with it? A. The ropes showed dry rot.

Q. That is, the rope? A. Yes, sir.

Q. What was the condition of the rope? A. It was frayed out and didn't look safe.

Q. And you and the members of your act refused to go up because of the condition of the rope? A. That is right." [Rep. Tr. pp. 368A-369.]

He, and his family were performers in this circus, and that he examined the rope, and that it did have dry rot, and that he refused to go up until his appliances were first hooked up by chains.

"Q. Did you think that because of the condition of the rope you wouldn't risk doing your act? A. Yes, sir.

Q. Because why; were you afraid? A. Afraid the main fall would break and let us down and it would cripple somebody.

Q. What did the manager do, you say? A. Sent out and got some chain and lashed the bale ring of the big top to the center pole so in the event the rope would break it wouldn't come down; it would stay there.

Q. Do you know from your many years of experience in the circus business and in the use of these riggings, whether the bale ring is ordinarily lashed to the pole?

Mr. Combs: We object to that as irrelevant, incompetent and immaterial; no proper foundation laid, and calls for a conclusion of the witness.

A. No, they are never lashed." [Rep. Tr. pp. 369-370.]

* * * * * * * *

"Q. Had you noticed the condition of the main falls before that time? A. No, sir, until I seen them break putting up, and then I went up and examined them when they had my rigging up. I seen them break when I put the rigging up and I examined them.

Q. What condition did you find them in when you examined them? A. Dry rot, indicating they had been laying around and not used.

Q. Can you explain a little more fully what you mean by dry rot? A. This rot exists after it is in a real dry place. It is manila rope, and they generally put a little tar in it and it drys out, just like you put grease in the cable, and it lays there and dries out, and dust gets in there and cuts the fiber and it eventually gets dry, and when it gets dry it is just like powder; it falls apart. Manila rope is oiled; it has some kind of oil in it, and if you aren't using

it it dries out and causes dry rot. Dust gets in it and cuts it, and they break up from being pulled over iron sticks or iron edges, and that cuts the fibers, and it finally weakens." [Rep. Tr. pp. 378-379.]

Mr. Priest, produced by the appellant, testified that he had had twenty years' experience with ropes, and that he examined the rope after it broke in Pasadena and found it to have dry rot. [Pr. Tr. p. 246.]

Considering the testimony of George Singleton, the old showman, who the Court said would have discovered the dry rot had it existed. It is apparent that from the following testimony [Pr. Tr. pp. 131-132]:

"A. I finally got one wagon, and then they commenced to come. Then along, I think when I was raising the big top, a fall became fouled, and when I hooked the elephant to it, the rope which fouled in the block, it cut the rope off. That was the lead line on the ground, the one that goes through the snatch block. And so I had to splice this rope.

Q. Did you do that personally? A. Yes. And proceeded to finish raising the canvas on the big top." [164]

* * * * * * * *

"The Court: You say, 'I spliced the rope.' What was the condition of the rope where it separated? A. The rope was in usable condition. I bought the rope myself and had been using it. I had been handling this property since 1937, and had replaced new rope from time to time, and rebuilt seats and poles, and whatever was necessary."

that this witness did not give any answer regarding the condition of the rope in respect to dry rot. The answer is evasive in that it is a general statement of opinion and not a direct answer to the Court's inquiry.

This is the man, the Court will remember, that had worked for the appellant but who testified on behalf of the appellee; the man that had a suit pending against the appellant in which the attorney for the appellee was also his counsel [Rep. Tr. p. 118]; this is the man that made a statement a short time after the circus closed and then repudiated it, and came into the camp of the appellee. [See Rep. Tr. p. 332 and pp. 120-123.] Therefore, we must not consider him as appellant's witness, and assume that he would have testified to a disclosure as to the condition of the rope. The ropes were all in the possession of the appellee, and none were produced by them.

In this finding, the Court has stated that it is impossible to detect the existence of dry rot by merely looking at the rope. This finding is entirely unsupported by any evidence. It is evidently an assumption or presumption that the Court has indulged in without due consideration of the evidence. All the testimony with respect to the condition of dry rot given by witnesses who have had considerable experience in handling ropes is that upon an examination they discovered the existence of dry rot.

POINT VI.

The Court Erred in Finding That There Was No Evidence That the Wagons Had Been Greased or Oiled and Drawing a Conclusion Therefrom That They Had Not Been Greased or Oiled, and at the Same Time Finding That the Appellant Employed a Staff of Efficient Showmen as Heads of the Several Departments. [Findings, Pr. Tr. p. 44.]

If the Court is to assume that there were efficient heads of the department, it is only fair to conclude that they had sense enough to grease a wagon the same as they must have had to feed a horse.

Why should the Court consider as a presumption that the wagons were not greased, rather than conclude that the presumption is that they were greased. The testimony of Mr. Priest that the spindles and axles were bent [Pr. Tr. p. 242] would indicate that the heating was caused by something far greater than lack of grease. There is direct testimony, however, that shows that they were greased; but despite this fact, they continued to give trouble [Pr. Tr. p. 94]:

> "A. The same wagon gave us trouble going back, although we had greased it.
>
> Q. But you greased it and it did operate all right? A. No. It gave us trouble. It had another hot box."

POINT VII.

The Court Erred in Concluding That the Appellant Accepted the Property "Without Discovering Any Fault of Any Sort or Fashion", and Then Immediately Concludes Further That the Appellant "Assumed to Make Reconditioning for Such Needed Repairs as Were Apparent." [Pr. Tr. p. 45.]

The evidence shows conclusively that the appellee never complied with the contract in delivering one circus train consisting of seven flat cars, two stock cars, two coaches and two sleepers, at lessor's expense, in good condition and ready for use to the lessee at Inglewood, California. The evidence does show that the cars were not in good condition or ready for use, and that they could not be used because of Inter-State Commerce Commission Regulations.

There is in evidence, various agreements entered into between the appellant and certain sponsors. [Deft's Exs. 1-13; Pr. Tr. pp. 250-257.] It should, therefore, be quite apparent that the appellant was legally bound to provide circus shows for these sponsors at the time and place named in these several contracts. The circus train was delivered in an improper and dangerous condition. The appellant was not thinking about legal rights and technicalities, but was trying to perform its contracts with its sponsors and at the same time carry out its contract with the appellee. In this endeavor, the appellant seeing that the appellee had wholly failed in this regard, ordered the

cars fixed. In the printed transcript, pages 194 to 217, appears Defendant's Exhibit No. 17, consisting of the reproduction of bills and repairs made to these cars.

Considering the position of the appellant at the time the circus equipment was delivered and also taking into consideration the promises made by the agents of the appellee, that the equipment would be in good condition and ready for use, it cannot be contended that there was any assumption on the part of the appellant to recondition the equipment. It has been pointed out wherein the equipment was deficient in the argument under POINT III. These were substantial elements but appellant was faced with a situation wherein it had to attempt to fulfill its obligations to its sponsors without sanctioning any of the deficiencies and relying upon the promise of the appellee that they would be corrected. The appellant attempted to go forward and produce the circus. The finding that there was an assumption on the part of the appellant to recondition at its own expense the equipment, and thus constituting a waiver is rebutted completely, we believe, by the argument in POINT II.

POINT VIII.

The Court Erred in Concluding That Appellant Closed the Circus Because Threatened With a Closed Shop by Labor Unions.

If the Court will consider the appellant's exhibits (1 to 13) [Pr. Tr. pp. 250-257], it will be apparent that these sponsors' contracts provided for the production of a circus for the sponsor. Naturally, it was up to the appellant to provide the equipment. Failure of equipment, as between the sponsor and the appellant, must rest on the shoulders of the appellant, but not necessarily so as between the appellant and appellee. Why should it be thought incredible, that the appellant on discovering that it could not carry on, because of the poor equipment, attempt to put itself in the best possible position, in making settlements with its sponsors? There was no effort on the part of appellant to put something over on the appellee. The telegrams which were sent to the sponsors were stipulated in evidence at the time of the pretrial hearing. It is true that Mr. Kramer of the American Federation of Music wanted a closed shop. Had appellant desired to avail itself of this type of relief and had it thought that the equipment could not be made to work, it could easily have handled Kramer in such a way that he would have called out the union men at Inglewood, and thus given the appellant the right to avail itself of the defense to the sponsors' contracts. But the fairness and honesty of the appellant is shown in no better way than its actions at a time when it least thought of legal difficulties, and

when it could not be deemed to be putting itself in a good legal position. While the appellant was trying to make the equipment function, it was also keeping the union quiet in its demands. For one week, appellant continued attempting to make things go. The record is replete with failure of equipment; wheels burning, rope breaking, poles falling, missed and delayed performances, and to this the appellee says—green labor. But green labor didn't break dry rotted ropes; green labor didn't make wagon wheels burn; green labor didn't delay performances, because appellee's expert, Mr. Singleton, testified that he had the tent up in Inglewood in three hours without difficulty, and could have put it up in less time. [Rep. Tr. p. 124.]

Appellee is simply taking advantage of a situation in which the appellant sent out telegrams and availed itself of a legal defense as against the sponsors after Kramer had called out his union labor due to a greater degree on account of the poor conditions. [Pr. Tr. pp. 235-238.]

POINT IX.

Opinion Evidence.

The Admission of Opinion Testimony Must Be Preceded by a Proper Foundation Showing That the Witness Is Qualified as an Expert by Reason of His Superior Knowledge and It Must Be Shown That He Has Had an Opporunity for Observation in Order to Draw His Conclusion Therefrom.

In considering the issue that the evidence set out in specification of error, Point IX, was erroneously admitted, the foundation of the evidence must be kept in mind in order that the substantial character of these errors be apparent.

Conceding for argument that the evidence was of such a peculiar nature that opinion testimony was proper, nevertheless, such opinion evidence gained by the expert must be based on some knowledge of the facts by observation. The distinction being that the expert is allowed to draw conclusions from his observation. However, we shall attempt to point out that these experts did not have sufficient foundation in observation to permit them to testify.

The excerpt of the testimony above set forth is forceful argument in itself that there was not a sufficient knowledge upon the part of this witness to express an opinion as to the condition of the wagons at the time in question.

In the first place the witness states he did not himself examine, but had a mechanic by the name of Forbes report to him. It is upon this hearsay evidence that the opinion is based. This objection goes to the force of the witness' whole testimony, for the Court upon the showing of his knowledge of the circus business allowed further opinion testimony as to items of equipment. [Pr. Tr. pp. 71-74.]

It cannot reasonably be said that this witness had the foundation to come within the language as set forth in the leading case of *Vallejo & Northern Ry. Co. v. Reed Orchard Company,* 169 Cal. 545, 570:

> "Witnesses who are skilled in any science, art, trade or occupation, may not only testify to facts, but are sometimes permitted to give their opinions as experts. This is permitted because such witnesses are supposed, from their experience and study, to have peculiar knowledge of the subject of inquiry which jurors generally have not. . . . To warrant its introduction, the subject of inquiry must be one relating to some trade, profession, science or art in which the persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have (Ferguson v. Hubbel, 97 N. Y. 513 (49 Am. Rep. 544); Young v. Johnson, 123 N. Y. 233, (25 N. E. 363); Excelsior etc. Co. v. Sweet, 57 N. J. L. 231, (30 Atl. 553).) 'When this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference. . . . It is not because a man has a reputation for superior sagacity and judgment, and power of reasoning, that his opinion is admissible. . . . It is because a man's professional pursuit, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt."

POINT X.

Opinion Evidence.

The admission of the evidence under specification of error, POINT X, was allowed by the statement of the Court on the theory that the witness was an expert and familiar with the business engaged in by the appellant. Such an allowance is undoubtedly made for the admission of such testimony under the proper circumstances.

> *Code of Civil Procedure,* Sec. 1870, subd. 9.
>
> "The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwritng; his opinion on a question of science, art, or trade, when he is skilled therein;"

Such exception, however, has no application to the present situation, and made no observation upon which he could base an opinion. The witness by his testimony was not present at the happening of the event referred to, and the question propounded to him is not confined to the reason for the accident as described in his testimony but is merely a conjecture as to what is usually the cause of such an accident and is not confined to this particular event. It is purely speculative evidence, whether given by an expert or whether given by a layman, it is clearly inadmissible.

POINTS XI and XII.

Opinion Evidence.

The testimony under Points XI and XII may be considered together. In both instances the witness testified that he made a very minute examination of the equipment. Even though the Court refuses to rule on the objection, he was allowed to state "that it looked to him to be useable". Such testimony does not even come within the category of an opinion, although it certainly has that force and effect. The witness testified that it looked to be useable. It is inconceivable upon what theory such evidence was admitted. It is true that the trial court is to determine the qualification of an expert witness and has a wide discretion in the determination thereof, but it is submitted that the Court clearly abused its discretion in permitting such evidence as hereinabove set out in the record.

Howland v. Oakland Cons. St. Ry. Co., 110 Cal. 513, at 521;

Kinsey v. Pac. Mut., 178 Cal. 153;

Dobbie v. Pac. Gas & Elec. Co., 95 Cal. App. 781.

POINT XIII.

The Judgment Is Not Supported by the Findings in That There Is No Finding to Sustain the Allegation of the Complaint That the Appellee Made an Effort to Mitigate Damages as Alleged in Its Complaint.

The appellee has not maintained the burden of proof as to damages. The appellee has alleged in its complaint [Pr. Tr. p. 2] "that plaintiff made every endeavor during the remainder of the term of said contract, to let said property to others but was unable so to do." There is no testimony by any witness produced on behalf of the appellee that any effort was made whatsoever to mitigate the damages by renting the equipment or attempting to rent the equipment to others. While it may be the rule that proof of mitigation of damages rests upon the defendant, in the instant case the appellee has assumed by this allegation the burden of proving damages sustained.

It is said in *Wilson v. Crown Transfer, Etc. Co.*, 201 Cal. 701, 706:

> "Where the plaintiff alleges that the goods stored were lost by fire due to negligence of the defendant, then the burden of proving these allegations is upon the plaintiff, but when the plaintiff's pleadings contain no such allegation, but the defendant, seeking to justify its refusal to return the goods, sets up their destruction by fire and alleges that the fire was not due to its fault or negligence, then the burden is upon the defendant to prove the allegation of its affirmative defense and show that it was free from negligence as to the cause of the fire."

It is submitted that these cases are closely analogous to the instant case and that the reasoning therein is applicable here.

Dieterle v. Bekin, 143 Cal. 683;

Cussen v. Southern Calif. Savings Bank, 133 Cal. 534;

U-Drive, Etc., v. System Auto Parks, 28 Cal. App. (2d) 782.

There is no showing that any attempt to rent the equipment was made during the remaining term of the contract. Dismissing all other points of error urged, the most that appellee could recover would be for one week, less the repairs and improvements made by the appellant.

Conclusion.

In conclusion, we submit:

1. The appellant had a right to look to the contract in determining the legal rights of the parties. This provided that the appellee would deliver to appellant at Inglewood the equipment named, in good condition and ready for use for at least five weeks; that the same was taken without examination and the appellee was not relieved of the law of California, as set forth in Section 1955 of the Civil Code.

2. The equipment was not received in good condition and ready for use and some of it was missing entirely.

3. The defects as set forth in the notice of rescission were not fully known until the day the equipment was returned. The defects appeared on each day. The testimony shows that at Inglewood the cars were repaired at

a cost of over $300.00; the Calliope didn't play, the elephant howdahs were not delivered. At San Diego, additional repairs had to be made to the flat cars by putting on new decks. At Santa Ana, the runs caused a wagon to tip over in leaving the car; wheels burned; and wagons were delayed. In leaving Santa Ana, a pole was dropped, fortunately no one was hurt. In Pasadena, the matinee on Memorial Day was missed, although there was a huge crowd present. The rope broke three times, and the testimony shows there was dry rot. At Pomona there was a further delay, and the afternoon performance was so late that its value was lost. These delays were not labor as is indicated where there were only sixteen men to erect a tent in Inglewood. This could have been done in Pasadena if the ropes had held.

4. The appellant had no alternative with such equipment and with the danger of injury to the public, and it may well be understood that the last thing it would want to do would be to face the sponsors in their unfulfilled promise to perform.

5. The rescission did not take place because of labor trouble. There was no reason to unionize a circus that could not perform, and the union representative himself testified that the condition of the equipment and the safety of his members was a consideration.

6. The rescission on the part of the appellant being justified, there should have been no judgment against it, but it should have recovered the damages which it sustained, and which the Court found to be $23,323.93 for one week. [Pr. Tr. p. 45.]

7. The appellee has failed to offer any evidence on the allegation contained in paragraph IV, "That plaintiff

made every endeavor during the remainder of the term of said contract, to rent said property to others but was unable so to do", and having adopted this as part of its case was bound to offer some proof. If the Court believed that the other issues had been met by the appellee by a preponderance of the evidence, yet with proof lacking on this issue, the appellee's recovery should be mitigated to one week, less the expenses incurred by the appellant in repairs to the equipment.

In conclusion, we submit that the judgment should be reversed and findings be made accordingly.

Respectfully submitted,

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